No. 202

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE JOCKEY CLUB,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Dated: June, 1956.

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Petitioner prays that a writ of certiorari issue to review the hereinafter-mentioned judgment of the United States Court of Claims.

Citation to Opinion Below

The Opinion of the Court of Claims (without the Findings of Fact and Conclusion of Law) is reported in 137 F. Supp. 419. It is not yet reported in the reports of the Court of Claims. It is printed (with the Findings of Fact) as Appendix A, *infra*, pp. 19-50).

Jurisdiction

The Opinion of the Court of Claims was dated and filed on January 31, 1956 (Appendix A, *infra*, p. 19).

The "Conclusion of Law" at the end of the Opinion is the Judgment (Appendix B, *infra*, p. 50). The Court dismissed the petition, by which plaintiff sought the refund of income taxes and some excess profits taxes paid for the years 1945, 1947, 1948, 1949 and 1950. Plaintiff's motion for rehearing was denied without opinion by order dated and entered April 3, 1956 (Appendix C, *infra*, p. 51). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

Question Presented

Does a corporation which is organized for purposes entitling it to exemption from income tax as a "business league" under Section 101(7) of the Internal Revenue Code of 1939 lose its exemption by engaging in activities, incidental to its tax-exempt purposes, from which it realizes income which is used and held entirely for such purposes?

Statute and Regulations Involved

The statutory provision involved is Section 101(7) of the Internal Revenue Code of 1939 (Appendix D, *infra*, p. 52).

The Regulations involved are Section 29.101(7)-1 of Regulations 111 (Appendix D, *infra*, p. 52).

Statement

1. The facts:

There is no dispute as to the facts, as found by the Findings of Fact which are made a part of the judgment (App. A, pp. 25-50). These Findings state all of the important facts.

Petitioner is a corporation existing and governed by the Membership Corporations Law of the State of New York (Finding 1, App. A, p. 25). Section 2 of the Law

defines a "membership corporation" as one "not organized for pecuniary profit". The Opinion below (summarizing Findings 2 and 3, App. A, pp. 25-26) states (App. A, p. 20-21):

> "The impetus for the formation of the plaintiff was furnished by the owners and breeders of thoroughbred race horses in the United States. In 1893 a group of them adopted a resolution proposing the formation of a Jockey Club of 50 members to encourage the development of the thoroughbred horse and to establish racing on a footing commanding public confidence and interest. They contemplated that the organization would establish a firm authority over all racing which might come within its control, protect the interest of the public in racing, and dispense justice in respect to all questions pertaining to racing which might affect the welfare of the associations racing under the rules of the proposed organization.
>
> The organization was formed and has carried out its projected purposes, as our detailed findings show."

In the accomplishment of those purposes petitioner maintains and has maintained since 1897 the only American Stud Book; it records the pedigree of thoroughbred horses; by reference to the Stud Book, breeders can determine the blood lines of every thoroughbred registered in the United States and measure the advantages of crossing blood lines; thoroughbreds are specially bred for speed, stamina and courage and other horses cannot compete with them in racing; horses cannot race at authorized meetings unless registered by petitioner; over 8000 thoroughbred foals are registered in the Stud Book each year (Findings 23, 26, App. A, p. 35). Without the Stud Book it would be impossible to conduct in the United States the breeding and racing of thoroughbred horses (Finding 25, App. A, p. 35). In addition, peti-

tioner compiles and publishes the Racing Calendar which contains information, available only therein, useful to breeders and racers of thoroughbred horses (Finding 29, App. A, p. 36).

Petitioner maintains a breeding station for the purpose of improving the breed of horses, where mares of farmers are served by thoroughbred stallions furnished in part by petitioner's members. The station is operated at a substantial loss (Finding 32, App. A, pp. 36-37).

Petitioner conducts, without charge, a school for training and improving the quality of officials who supervise race meetings throughout the United States; such officials are in great demand (Finding 31, App. A, p. 36).

Petitioner has promulgated rules of racing which are the basic rules under which racing is conducted in the United States; the rules are designed to permit orderly racing, to prevent participation in racing by persons of questionable character and to prevent deception or confusion; they deal with every facet of racing such as licensing of owners, trainers and jockeys, sanctions for breach of the rules, the registration of thoroughbreds, names of horses, partnerships, leases and other agreements for the racing of horses, jockeys' contracts, racing colors, as well as the conduct of race meetings (Findings 19, 20, App. A, pp. 33-34). From 1945 through 1950 all running race meetings conducted in the State of New York were required, by statute, to be conducted in accordance with the rules and regulations of petitioner (Finding 16, App. A, p. 31), and a New York statute provided that, "for the purpose of maintaining a proper control over race meetings," petitioner should license owners, trainers and jockeys (Finding 17, App. A, p. 32).

Petitioner's membership is composed of fifty persons all of whom are or were owners or breeders or both, of thoroughbred horses (Finding 6, App. A, p. 27). It has no capital stock, corporate shares or certificates of owner-

ship of any kind; members must be elected (Findings 4, 8, 9, App. A, p. 27). It is not a club in the sense of a social club (see Finding 15, App. A, p. 30). None of the members receives any participation in any form in the revenues nor is any member entitled to receive any distribution of profits of petitioner during its existence or at its dissolution (Findings 56, 57, 58, App. A, p. 46). Petitioner performs no services for its members which it does not perform for non-members, and its requirements, fees and charges are the same for members as for non-members (Finding 46, App. A, p. 39).

Breeding and racing thoroughbred horses are businesses conducted for the purpose of making profits (Finding 34, App. A, p. 34). Millions of dollars are invested in breeding farms (Finding 33, App. A, p. 37). There is a very substantial commerce in the sale of thoroughbreds (Finding 36, App. A, p. 37). The motivation for entering thoroughbreds in races is the winning of purses, which enhances the value of the horses both for sale as race horses and as breeding stock (Finding 43, App. A, pp. 38-39). Each of petitioner's members has a common interest in the breeding and racing of thoroughbred horses (Finding 44, App. A, p. 39).

Petitioner's income is derived from dues and initiation fees of members, interest on investments, licensing fees, the sale of the American Stud Book and the Racing Calendar (both probably without profit—Finding 30, App. A, p. 36), from fees for registering horses and racing colors and filing of contracts, and from "racing commissions" of $300 a day which it receives from five tracks in New York and one in Delaware (Findings 48, 49, App. A, pp. 40-43) under contracts, a typical one of which reads in pertinent part as follows (Finding 47, App. A, p. 40):

> "Because of your long experience, your records and your means of preventing frauds and other acts detrimental to the best interests of racing, we

> desire to retain you to advise us in respect of the conduct of our 1951 race meeting, and particularly to assist us in safeguarding our race meeting and facilities against anything which would be harmful or detrimental to racing."

Petitioner's net income for the years 1945, 1947, 1948, 1949, 1950 was, respectively: $19,013.01, $65,461.14, $65,755.79, $61,697.28, $60,171.55 (Finding 49, App. A, p. 43). Petitioner's accumulated surplus at the end of 1950 was $730,243.78 for the period beginning 1894; for that period its total receipts from dues (including initiation fees) and from investments were $767,746.85; of this amount $426,700.00 came from dues (including initiation fees) and $341,046.85 was income from investments; during twelve of the years between 1894 and 1950 petitioner sustained losses (Finding 50, App. A, p. 44). With the exception of some payments to charities, all of petitioner's earnings are used and held for its purposes and activities (Finding 51, App. A, p. 44).

2. The decision of the Court of Claims:

The Court of Claims found (Opinion, App. A, pp. 20-21) that petitioner was organized for and has carried out "its projected purposes", as hereinabove stated; that during the years 1945 through 1950 petitioner's members "had a common interest in the breeding and racing of thoroughbred horses" (Finding 44, App. A, p. 39); that during those years "petitioner's purpose was to promote the common interest in the breeding and racing of thoroughbred horses, and its activities were directed toward this purpose during those years" (Finding 45, App. A, p. 39); and that its activities "are indispensable to the business of breeding and racing" (Finding 35, App. A, p. 37).

Nevertheless, it concluded that petitioner failed to meet the two following requirements of Regulation 111, Section 29.101(7)-1:

> "A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. * * * Thus its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. * * *"

The two grounds upon which the Court held that petitioner did not meet those requirements were stated in the Opinion (App. A, pp. 23-24), as follows:

> (1) "it engages in a regular business of a kind ordinarily carried on for profit"; and
>
> (2) "one of its principal activities and sources of income is the 'performance of particular services for individual persons' ".

The dismissal of the petition was based solely upon the two grounds just stated.

As the reason for ground (1) of the holding it was stated (Opinion, App. A, p. 24):

> "The publication of the Stud Book and the Racing Calendar are activities of a sort which, if the plaintiff did not cover the field, would quite certainly be undertaken by someone as a business activity with a view to making a profit * * *."

As the reason for ground (2) of the holding it was stated (Opinion, App. A, p. 24):

> "The services which the plaintiff performs for individual persons, other than 'racing commissions' and the fees charged therefor, are shown in finding 48."

The Opinion then mentions the services performed for race tracks in return for "racing commissions" of $300 per day, and continues (App. A, p. 25):

> "These services were bought and paid for by the tracks so that the races would be orderly and reputable, and spectators and bettors would continue to patronize them, to the profit of the owners of the tracks, the horses, and the betting concessions."

The Court did *not* find that any of these activities was unrelated to the principal purposes for which petitioner was organized or that they were not necessary or useful for the attainment of such purposes, but it concluded that exemption should be denied because they were activities which could have been engaged in by others for profit and petitioner in fact realized profits from some of them.

Reasons for Granting the Writ:

In spite of the Findings which establish so clearly the tax-exempt nature of petitioner's purposes and activities and the fact that (except for some payments to charities) all of its income is used and held for its purposes and activities, the Court below concluded "as a matter of law" (App. B, p. 50) that the petition should be dismissed. This conclusion was based upon the fact that petitioner engaged in the income-producing activities above mentioned. The legal principle thus stated emasculates the exemption intended by Congress to be given to "business leagues"—by depriving them of the exemption where their income is derived from and devoted to the very activities upon which the exemption is based.

The holding below conflicts with the principle enunciated by this Court and by several courts of appeals and with the intent of Congress as clearly expressed in the 1950 amendments of the Internal Revenue Code.

In *Trinidad* v. *Sagrada Orden,* 263 U. S. 578 (1924), this Court, in construing a statute granting exemption from tax upon the income of a religious organization, established the principle that the purpose of the corporation, not its business transactions furthering that purpose, is controlling on the question of its right to exemption. As the Court stated (at 581), the exempting statute "says nothing about the source of the income, but makes the destination the ultimate test of exemption". This Court recognized that a corporation, organized for an exempt purpose, may have income from its transactions without losing its exemption.

In *Commissioner* v. *Chicago Graphic Arts Federation, Inc.,* 128 F. 2d 424 (C.C.A. 7—1942), the Board of Tax Appeals had allowed exemption to the Federation as a "business league" under Section 101(7). The Commissioner appealed urging that exemption should have been disallowed "because the respondent conducted a cost accounting and estimating course and waste paper bureau, supplied a credit and employment service and received a percentage of the fees in connection with the litigation concerning the retailers' occupational tax".

In affirming unanimously, the Court regarded the *Trinidad* decision as controlling. It said (at 426):

> "The statute as interpreted by the regulations says that the purpose of the business league must not be to engage in a regular business of a kind ordinarily carried on for profit. Where the business league has proper purposes without prohibited ones, then, if it operates in conformity to it, it is entitled to exemption. To come within the exemption, however, its activities must be directed to the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons, but if the services are only incidental or subordinate to *the main or principal purposes* required by

> statute, then exemption cannot be denied on the ground that the purpose is to engage in a regular business of a kind ordinarily carried on for profit, Retailers Credit case, supra." (Italics supplied.)

Several courts of appeals in addition to the Seventh Circuit have applied the rule of the *Trinidad* case in determining the right to exemption as a "business league". See, for example, *Crooks* v. *Kansas City Hay Dealers Assn.*, 37 F. 2d 83 (C.C.A. 8—1929); *Retailers Credit Assn.* v. *Commissioner*, 90 F. 2d 47 (C.C.A. 9—1937).

Not only does the decision of the Court below conflict in principle with the *Trinidad* and the *Chicago Graphic Arts* cases, but also it conflicts with its own decision in *Sico Co.* v. *United States*, 102 F. Supp. 197 (1952), wherein, in construing Section 101(6) of the 1939 Code granting exemption to charitable organizations, the Court of Claims said (at 199):

> "It is sufficient to say that the great weight of authority on the question presented is to the effect that under facts such as are involved in this case, the exemption from taxation granted by the statutes makes the destination of the income, that is, the purpose and object to which it is devoted, rather than its source, the ultimate test of its exemption."

In so holding, the Court of Claims expressly followed the *Trinidad* case. In the instant case, contrariwise, it held that the source, not the destination, of the income was determinative of the right to exemption.

Under other sections of the Internal Revenue Code (Sections 101(6) and 101(8)), in which exemption was allowed against objection that the activities were commercial, or that the taxpayer was "organized for profit", the test was held to be the main or principal purpose or purposes

of the taxpayer, as distinguished from its activities or sources of income—even where, in some cases, the income from outside activities was "substantially all", or the major part, of the taxpayer's income.[1] As otherwise stated, the test of exemption is "the taxpayer's dominant and controlling purpose".[2]

The expressed Congressional intent accords with the *Trinidad* case. It was manifested by the enactment of Section 301 of the Revenue Act of 1950, amending Sections 421 and 422 of the 1939 Code, and by the enactment of Section 302 of said Revenue Act (App. D, pp. 53-55). By these so-called "Supplement U" amendments a tax was levied upon that portion of the net income of exempt organizations in excess of $1,000 derived by any organization from an "unrelated trade or business". "Unrelated trade or business" was defined as "* * * any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 101 * * *". The corollary to this intent to tax unrelated income is that income related to an exempt purpose shall not be taxed. In fact, Section 302(a) of the 1950 Revenue Act (App. D, p. 55) provided:

> "(a) Trade or business not unrelated.—For any taxable year beginning prior to January 1, 1951, no organization shall be denied exemption under paragraph (1), (6), or (7) of section 101 of the

[1] *Debs Memorial Radio Fund* v. *Commissioner*, 148 F. 2d 948 (C.C.A. 2—1945), at 951; *United States* v. *Pickwick Electric Membership Corp.*, 158 F. 2d 272 (C.C.A. 6—1946); at 276-277; *Commissioner* v. *Orton*, 173 F. 2d 483 (C.A. 6—1949), at 486; *Scofield* v. *Rio Farms, Inc.*, 205 F. 2d 68 (C.A. 5—1953), at 72.

[2] *Consumer-Farmer Milk Co-op.* v. *Commissioner*, 186 F. 2d 68 (C.A. 2—1950), at 71.

> Internal Revenue Code on the grounds that it is carrying on a trade or business for profit if the income from such trade or business would not be taxable as unrelated business income under the provisions of Supplement U of the Internal Revenue Code, as amended by this Act, * * *."

Further evidence of the Congressional intent is found in the Senate and House reports on H. R. 8920 (the proposed Revenue Act of 1950). Senate Report No. 2375, 81st Congress, 2d Session, 1950, gives instances of the application of the Amendment as follows (at p. 29):

> "Athletic activities of schools are substantially related to their educational functions. For example, a university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students of other schools.
>
> "In the case of an educational institution, income from dining halls, restaurants, and dormitories operated for the convenience of the students would be considered related income and, therefore, would not be taxable. Income from a university press would be exempt in the ordinary case since it would be derived from an activity that is 'substantially related' to the purposes of the university."

In the Ways & Means Committee Report, it is stated (H. R. Report No. 2319—81st Congress, 2d Session—1950) as follows (at p. 109):

> "For example, a wheat farm operated by an exempt agricultural college as part of its educational program would be considered a related business. Of course, income of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business, since its athletic activities are substantially related to its educational program. * * *"

The 1950 amendments and the legislative history are very significant in showing that even large sources of

income, if "substantially related" to tax-exempt purposes, were not intended to cause the loss of tax exemption under Section 101(1), Section 101(6), or Section 101(7).

No activities could be more clearly "related" to an organization's tax-exempt purposes than were the activities which the Court below held to deprive petitioner of exemption.

The services rendered to the race tracks in return for "racing commissions" of $300 per day were rendered in the carrying out of one of petitioner's most important and predominant duties. The origin of this race track supervision was in the resolution adopted in 1893 at the above-mentioned meeting of owners of race horses, objectives of which were to establish public confidence, to protect the interest of the public and to look after "the welfare of the associations which may race under the rules of this proposed organization" (Opinion, App. A, p. 29; Finding 2, App. A, pp. 25-26). Not long after petitioner was incorporated the New York Court of Appeals in *Grannan* v. *Westchester Racing Association*, 153 N. Y. 449 (1897), said (at 462):

> "Considering the corrupt practices which formerly prevailed, that the purpose of the statute and rules of the club was to prevent their continuance, and that the rules were in effect adopted by statute and made applicable to all racing associations organized under it, it is manifest that the rules which permitted the jockey club to exclude a person guilty of dishonest practices, or of a willful breach of its rules, from races conducted by associations subject to them, cannot, as a matter of law, be held unreasonable."

The other services to which the Opinion refers, that is, the services shown by Finding 48 (App. A, pp. 40-41), may be summarized as follows:

> issuing racing permits, registering foals, naming horses and changing their names, filing partnerships, leases and other arrangements for the racing of horses, registering assumed names and changes thereof, licensing owners, trainers and jockeys, filing contracts between jockeys and their employers, registering racing colors, and publishing the Stud Book and the Racing Calendar.

Such services were incidental to petitioner's main or principal purposes. They were the *means* by which such purposes were accomplished. None of the services were what might be termed "outside activities". They were rendered only to persons who had to meet petitioner's requirements. There is a very clear and important distinction between, on the one hand, services which are rendered to the public and destroy exemption because the primary purpose is commercial and, on the other hand, petitioner's services which were rendered because they must necessarily be rendered in the accomplishment of petitioner's tax-exempt purposes and the income from which was devoted entirely to the accomplishment of those purposes.

The first ground of the decision, *viz.*, that petitioner "engaged in a regular business of a kind ordinarily carried on for profit" is not supported by any finding that there *is* any such regular business. This defect was evidently intended to be supplied by the following statement in the Opinion (App. A, p. 24):

> "The publication of the Stud Book and the Racing Calendar are activities of a sort which, if the plaintiff did not cover the field, would quite certainly be undertaken by someone as a business activity with a view to making a profit."

In this respect the decision below comes precisely within the condemnation of *U. S.* v. *Causby*, 328 U. S. 256

(1946), wherein the judgment of the Court of Claims was reversed because there was no finding as to whether the easement taken by the United States was temporary or was permanent. This Court said (at 267) that the deficiency in the findings could not be rectified by the statement in the lower court's opinion that the United States "no doubt" intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so. In the present case the lower court said that the publication of the Stud Book and the Racing Calendar are activities of a sort which, if the plaintiff did not cover the field, would "quite certainly" be undertaken by someone for profit.

In *United States* v. *Shoshone Tribe,* 304 U. S. 111 (1938), the Court said (at 115):

> "The opinion of the Court of Claims may not be referred to for the purpose of eking out, controlling, or modifying the scope of the findings."

Furthermore, the evidentiary findings necessarily override the above-mentioned statement in the lower court's opinion. Those findings establish that the publications are unique. There is a finding of fact that "There is no other publication in the United States like the American Stud Book" (Finding 24, App. A, p. 35), and a finding that "Without the American Stud Book it would be impossible to conduct in the United States the breeding and racing of thoroughbred horses" (Finding 25, App. A, p. 35). There is a further finding that the Racing Calendar prints information which is available only therein (that is, information acquired by petitioner in the performance of its particular duties) and is important to the businesses of breeding and racing horses (Findings 29, 19, App. A, pp. 36, 33-34).

In *United States* v. *Penn Manufacturing Co.,* 337 U. S. 198 (1949), the judgment of the Court of Claims was

reversed because the evidentiary findings were held (at 212-213) to override the ultimate finding or conclusion.

Even if the evidentiary findings did not so clearly override the conclusion, this Court, in *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481 (1937), has stated (at 491) that the ultimate finding "is subject to judicial review and, on such review, the court may substitute its judgment for that of the board."

Resolution of the question of whether there is one criterion of exemption for "business leagues", that is, the source of income, and a different one for the other exempt organizations, that is, the destination of the income, is of great general importance in the administration of Section 101(7) of the 1939 Internal Revenue Code—which has been re-enacted without change (it is presently Section 501(6) of the 1954 Code). Its re-enactment was against the background of Sections 301 and 302 of the Revenue Act of 1950 expressly relieving related income from the tax—a clear expression of Congressional intent.

If the decision below shall be allowed to stand, confusion will be created in other courts attempting to construe the exempting statute, and in the Court of Claims no business league which realizes substantial profits from activities incidental to its exempt purpose will be able to recover taxes unlawfully exacted from it.

There is a difference of opinion among the circuits as to whether or not the *Trinidad* decision is of general application. The Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits have regarded that decision

as having general application,[1] but the Fourth Circuit has held the decision to be limited in application to the facts in that case including, particularly, the fact that the income involved was small.[2]

Petitioner believes that the *Trinidad* decision is of general application. For example, this Court said (263 U. S. at 582):

> "In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

The decision contains no language indicating that the Court held exemption to be controlled by such facts as the amount of the organization's income. If petitioner is correct in its belief, certiorari should be granted because the decision of the lower court, conflicting with the decision of this Court, should not be allowed to stand. If, however, this Court should consider that the *Trinidad* decision—which appears to be the only pertinent decision by this Court—is not clearly of general application, then there is here a situation wherein—in the language of this Court's Rule 19.1.(b)—the court below "has decided an important question of federal law which has not been, but should be, settled by this court".

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[1] *Crooks* v. *Kansas City Hay Dealers Assn.*, 37 F. 2d 83 (C.C.A. 8—1929), at 85-86; *Retailers Credit Assn.* v. *Commissioner*, 90 F. 2d 47 (C.C.A. 9—1937), at 51; *Roche's Beach, Inc.* v. *Commissioner*, 96 F. 2d 776 (C.C.A. 2—1938), at 778; *Commissioner* v. *Chicago Graphic Arts Federation*, 128 F. 2d 424 (C.C.A. 7—1942), at 426; *Bohemian Gymnastics Assn.* v. *Higgins*, 147 F. 2d 774 (C.C.A. 2—1945), at 776; *United States* v. *Pickwick Electric Membership Corporation*, 158 F. 2d 272 (C.C.A. 6—1946), at 277; *Commissioner* v. *Orton*, 173 F. 2d 483 (C.A. 6—1949), at 486; *Willingham* v. *Home Oil Mill*, 181 F. 2d 9 (C.A. 5—1950), at 10; *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (C.A. 3—1950), at 121-122; *Scofield* v. *Rio Farms, Inc.*, 205 F. 2d 68 (C.A. 5—1953), at 72.

[2] *United States* v. *Community Services*, 189 F. 2d 421 (C.A. 4—1951), at 427.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: June, 1956.

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APPENDIX A

Opinion and Findings

IN THE

United States Court of Claims

No. 197-53

(Decided January 31, 1956)

THE JOCKEY CLUB

v.

THE UNITED STATES

Mr. John W. Burke, Jr., for the plaintiff. *Messrs. William T. Pullman* and *H. C. McCollom* were on the briefs.

Mr. Roger M. Stuart, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for the defendant. *Mr. Andrew D. Sharpe* was on the brief.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff is a New York corporation organized in 1894. It has no capital stock, corporate shares, or certificates of ownership of any kind. It had a net income during the tax years 1945 through 1950, except the year 1947. It was taxed upon that income, and seeks to recover the taxes paid, on the ground that it was exempted from

taxation by Section 101 (7) of the Internal Revenue Code of 1939, which says:

> Sec. 101. Exemptions from Tax on Corporations.
>
> The following organizations shall be exempt from taxation under this chapter—
>
> (7) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

The purposes of the plaintiff, as stated in its certificate of incorporation are:

> The investigating, ascertaining and keeping of a record of the pedigree of horses, and of instituting, maintaining, controlling and publishing a *Stud Book* or Book of Registry of horses in the United States of America and Canada; and of promoting and holding exhibitions of such horses *and generally for the purpose of improving the breed thereof.*

The impetus for the formation of the plaintiff was furnished by the owners and breeders of thoroughbred race horses in the United States. In 1893 a group of them adopted a resolution proposing the formation of a Jockey Club of 50 members to encourage the development of the thoroughbred horse and to establish racing on a footing commanding public confidence and interest. They contemplated that the organization would establish a firm authority over all racing which might come within its control, punish offenders against accepted racing rules, protect the interest of the public in racing, and dispense justice in respect to all questions pertaining to racing which might affect the welfare of the associations racing under the rules of the proposed organization.

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The organization was formed and has carried out its projected purposes, as our detailed findings show. Its Registration Department maintains and publishes the American Stud Book, in which breeders can learn the blood lines of every thoroughbred registered in the United States. Strict proof of eligibility to be registered in the Stud Book is required. More than 8000 foals are now registered each year. The book is indispensable to the breeding and racing of thoroughbred horses in the United States.

The plaintiff publishes monthly the Racing Calendar which gives information about the names of horses, assumed names, partnerships, arrangements for the leasing of horses, jockey contracts, and registered colors. It conducts, without charge, a school for training and improving the quality of officials who supervise race meetings throughout the United States.

The plaintiff has adopted and promulgated rules of racing, which are accepted as the basic rules, and have been adopted wherever racing is conducted. They are designed to insure orderly racing, to prevent participation in racing by persons of questionable character and to eliminate deception and confusion. They deal with every feature of the arrangements necessary for the conduct of racing.

The plaintiff investigates the behavior of jockeys, keeps records of rulings against them for careless and fraudulent practices and other misconduct and, if necessary, takes disciplinary action against them and against owners and trainers. During the tax years here in question, the plaintiff passed upon applications of owners, trainers and jockeys for licenses, investigating their character and responsibility, and in proper instances, took disciplinary action against them. Such disciplinary measures taken by

the plaintiff were recognized by all jurisdictions where racing takes place, both in the United States and abroad. The plaintiff's records are consulted by racing authorities throughout the United States.

The statutes of the State of New York provide that one of the three stewards required for each racing meet shall be appointed by the plaintiff, and empower the plaintiff to license owners, trainers and jockeys in that State and to revoke such licenses for cause.

The plaintiff's by-laws provide for a membership of 50 persons, each of whom shall be interested in the breeding and racing of thoroughbred horses. Membership is not transferable. In the years in question, 35 or 36 of the members owned breeding farms, and, all, with possibly one exception, owned or raced thoroughbred horses. The plaintiff's affairs are managed by nine stewards, elected for two-year terms. They receive no compensation. It has the usual corporate officers of whom only the Executive Secretary receives a salary. He is not a steward or a member of the plaintiff. There are some 22 employees.

The plaintiff has a rented office in New York City and a breeding farm at Avon, New York. It has no club house, restaurant, bar or other facilities for entertainment. Stallions, some of which belong to members of the plaintiff, are kept at the breeding farm. Nominal stallion fees are charged but the farm does not make a profit.

The plaintiff's income is derived from initiation fees of $200, and annual dues of $200 from each member, stallion fees, registration and license fees, proceeds from the sale of the American Stud Book and Racing Calendar, and compensation paid by five New York race tracks and one race track in Delaware for the supervision of race meetings. In each of four of the five years here in question

the plaintiff had a net income of more than $60,000. Its surplus, which had been accumulated since 1894, was $730,243.78 at the end of 1950. Except for some payments to charities, its income is used, or held, for its corporate purposes. It has in contemplation new activities within its corporate field which would require large expenditures.

The plaintiff claims that it is a "business league", within the meaning of Section 101 (7) of the Internal Revenue Code of 1939, which we have quoted above, and that its income is exempted from taxation by that statute. The statute does not define business leagues, but an indication of what Congress intended by the expression may be gathered from the fact that they are named along with chambers of commerce, real estate boards, or boards of trade. Section 29.101 (7)–1 of Regulations 111 (26 C. F. R.), promulgated by the Commissioner of Internal Revenue says:

> A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. * * *

The plaintiff offers no objection to the regulation but insists that it fits the definition. We think the plaintiff is "an association of persons having some common business interest, the purpose of which is to promote such common interest * * *." But we think the plaintiff

does not comply with the regulation as a whole, because (1) it engages in a regular business of a kind ordinarily carried on for profit and (2) because one of its principal activities and sources of income is "the performance of particular services for individual persons."

The publication of the Stud Book and the Racing Calendar are activities of a short which, if the plaintiff did not cover the field, would quite certainly be undertaken by some one as a business activity with a view to making a profit. The breeding and racing of thoroughbred horses is, no doubt to a considerabl degree due to the plaintiff's activities and its integrity, big business. Publications carefully prepared, and necessary or interesting to those engaged in the business would sell, just as do the innumerable trade publications presently on the market.

The services which the plaintiff performs for individual persons, other than "racing commissions" and the fees charged therefor, are shown in finding 48. Each of these services is, by the tradition of the industry or even by law, essential to the individual who requests and pays for the services. They are comparable to a lawyer's certificate of title, or a doctor's certificate of health. The "racing commissions" charges of $300 per day, which the plaintiff received from five tracks in New York and one in Delaware, were for services described in the contracts as follows:

> Because of your long experience, your records and your means of preventing frauds and other acts detrimental to the best interests of racing, we desire to retain you to advise us in respect to the conduct of our 1951 race meeting, and particularly to assist us in safeguarding our race meeting and facilities against anything which would be harmful or detrimental to racing.

These services were bought and paid for by the tracks so that the races would be orderly and reputable, and spectators and bettors would continue to patronize them, to the profit of the owners of the tracks, the horses, and the betting concessions. We think that these services sold to particular enterprises, which sales produced practically all of the plaintiff's large income, disqualify it for the tax exemption granted by Section 101 (7) of the regulations. Its petition will, therefore, be dismissed.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Wilson Cowen, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff is a corporation organized in 1894, pursuant to an act of the Legislature of the State of New York passed April 20, 1891, entitled "An Act to provide for the formation of Corporations for improving the breeds of domestic animals," which enactment has since been superseded by laws subsequently passed and embodied in what is known as the Membership Corporations Law of the State of New York. At all relevant times it has had its principal office at 250 Park Avenue, New York, New York.

2. A committee, appointed at a special meeting of owners of race horses, met on December 27, 1893, and adopted the following resolution:

> It is proposed at the instance and at the request of a large number of the Owners and Breeders in

the United States that a Jockey Club be formed with a roll of, say, fifty.

Its purpose to be, not only to encourage the development of the thoroughbred horse, but to establish racing on such a footing that it may command the interest as well as the confidence and favorable opinion of the public.

That this club shall be formed with a membership as above stated, which is to include the present members of the Board of Control, or such of them as may be in accord with the purposes and objects which the proposed new organization is intended to accomplish, viz:

First: To establish a firm authority over all racing upon all the Association's courses which may come under its control.

Second: To punish offenders against accepted racing laws.

Third: To protect the interests of the public and thereby insure its confidence and support.

Fourth: To maintain and dispense exact justice in respect to all questions pertaining to racing, or the interests of racing, which may affect the welfare of the associations which may race under the rules of this proposed organization and which are incident to the ownership of the properties.

The original of the above-quoted resolution has been in the continuous custody of The Jockey Club since 1942.

3. The particular objects and purposes of the plaintiff as set forth in its Certificate of Incorporation are "the investigating, ascertaining and keeping a record of the pedigree of horses, and of instituting, maintaining, controlling and publishing a *Stud Book* or Book of Registry of horses in the United States of America and Canada; and of promoting and holding exhibitions of such horses *and generally for the purpose of improving the breed thereof.*"

4. The plaintiff has no capital stock, corporate shares or certificates of ownership of any kind.

5. During the years 1945 through 1950 its membership was limited to 50 persons.

6. For the years 1945 through 1950, about 35 or 36 of the 50 members owned thoroughbred breeding farms. With the possible exception of one member, all of the members during that period of years had at one time or another owned or raced thoroughbred horses.

7. The bylaws of the plaintiff in effect during the years 1945 through 1950 provided for the election of members by the membership.

8. Memberships in the plaintiff are not transferable.

9. Each candidate for membership in The Jockey Club must be proposed and seconded by members of the club before he can be elected to membership. All members are required to pay the specified dues. The qualifications for membership are that the candidate be a person of high standards and character and that he be interested in the breeding and racing of horses.

10. The initiation fee payable by each member on his election is $200 and the annual subscription of members is $200 a year. The dues were raised from $100 in 1926, when plaintiff moved to 250 Park Avenue.

11. The affairs of the plaintiff are managed by nine stewards who determine all matters pertaining to racing. Their powers and duties are set forth in the Rules of

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Racing promulgated by The Jockey Club. These are listed as follows in the index to the Rules of Racing:

Stewards of the Jockey Club, have power to—
act on undecided cases of Stewards
appoint and approve officials
approve camera for photographic finishes
approve contracts of jockeys and employers
approve or disapprove names
approve starting gate
authorize acceptance of entry after time for closing
authorize transfer of entries in event of death
change course
consent to appeal from decisions of Stewards
fine employers of unlicensed trainers or jockeys
fix penalty where none specified
grant and revoke licenses
grant and revoke amateur riders licenses
grant and withdraw approval of meetings
grant permission to change names
grant permission to handicapper to rectify omission through error
grant permission to register horses after November 1
grant registration of foreign horses
hear appeals of prevented employment
hear and decide cases on appeal
increase punishments and fines of Stewards
inquire into and deal with any matter relating to racing
modify, change or remit fines or penalties
punish or rule off
punish or rule off for employing persons without written discharge
refer appeals to general meeting
refuse entries and transfers
rule off defaulting purchasers

rule off for fradulent claim
rule off for intimidation or collusion
sanction meetings
settle disputes pertaining to racing colors
suspend and revoke licenses
vary rules to conform with conditions outside New York State
have charge of forfeit list and registrations
have free access to all parts of racing plant
joint session, powers of
must be satisfied as to identity and age of foreign horse

The Board of Stewards of plaintiff corresponds to the board of directors of a business corporation. The stewards receive no compensation nor do the members, but money is provided for a fund to reimburse members for travel expenses. There is no evidence, however, that any member has ever been reimbursed from this fund for travel expenses incurred by him.

12. Stewards are elected by ballot for terms of two years.

13. The officers of the plaintiff consist of a Chairman of the Board of Stewards, a Vice Chairman, a Secretary, a Treasurer and an Executive Secretary and Assistant Treasurer. The only salaried officer is the executive secretary, who actively supervises all the departments of plaintiff and receives $12,000 a year. He is not a steward or a member of The Jockey Club.

In addition to the performance of his duties for plaintiff, the executive secretary also serves as one of three officials designated as stewards of race meetings held in the State of New York. Pursuant to a law of the State of New York, one of the stewards for the meeting is appointed by

The Jockey Club, one by the State Racing Commission, and one by the association holding the race meeting. The steward appointed by The Jockey Club is its executive secretary. For his services as a steward of a race meeting, he is paid by the racing association, and his total annual compensation received from the several race track associations in New York amounts to approximately $40,000 per year. The duties of the three stewards appointed as above described are to supervise the racing, including the hearing of any complaints.

14. Plaintiff employs about 22 persons of whom 7 are employed in the general office, 11 in its registration department and 4 at its breeding bureau.

15. Plaintiff does not own any club house or any real estate except its breeding bureau at Avon, New York. Its office at 250 Park Avenue is rented by it and is equipped with desks, typewriters, file cabinets, etc. Its office includes space for its executive secretary and staff, its registration department, and a large reading room or library containing racing records, which is open, without charge, to members of the public interested in horse breeding and racing. The plaintiff does not have a restaurant or bar or club rooms or facilities for entertainment. It has the use of a room at each of the race tracks in New York without charge for rental. The executive secretary of the plaintiff has an office in these rooms. Plaintiff does not have dances or parties but has had a Christmas dinner for its membership.

The stewards of The Jockey Club hold meetings whenever business justifies it and they hold considerably more than 12 meetings a year. At these meetings applications to register foals and foreign importations, and applica-

tions for naming of colts and changing of names are granted or rejected. The problems of the stud book are determined and all matters which have to do generally with racing such as the promulgation of the rules of racing, approval of the appointment of officials, reviewing cases of malpractices in breeding or registration are subjects for discussion and determination at the meetings of the stewards of The Jockey Club.

16. During the years 1945 through 1950 a statute of the State of New York provided that every license for the conduct of a race meeting must contain a condition that the meeting shall be subject to the reasonable rules and regulations from time to time prescribed by The Jockey Club, a corporation organized under the laws of the State of New York.

Rule 1 of the Rules of Racing promulgated by The Jockey Club provides as follows:

> 1. A recognized meeting is:
>
> (a) A meeting held with the sanction of the Stewards of The Jockey Club in that portion of the United States over which The Jockey Club exercises jurisdiction.
>
> (b) A meeting held in other portions of the United States, or in any foreign country, with the sanction of any turf authority whose jurisdiction over racing of any nature is recognized by The Jockey Club and which gives effect to sentences imposed by The Jockey Club upon those guilty of fraudulent turf practices.

Rule 34, bearing the caption "Powers of the Stewards of the Jockey Club", provides in part as follows:

> (a) The Stewards of The Jockey Club shall have power, at their discretion, to grant licenses to

Owners, Trainers and Jockeys and to such other persons, exercising their occupations or employed at race meetings as the State Racing Commission may determine to require a license from The Jockey Club and, when a member of the State Racing Commission is in attendance, they may revoke such licenses. Every such license issued by The Jockey Club shall provide that the licensee shall comply with the Rules and Regulations of the Commission and these Rules of Racing, and that violation thereof may be punished by fine, suspension of the privileges accorded thereby, or revocation of the license. No license shall be issued by said Stewards to a person shown to the satisfaction of said Stewards to be engaged, or to have been engaged in practices detrimental to the best interests of racing, including bookmaking or pool-selling, or to anyone so shown to be, or to have been, connected with any such person in any such practice, provided that in cases in which the Stewards shall find that such occupation or connection has ceased for a sufficiently long period of time, they may, in their discretion, issue such license. Nor shall a license be issued by said Stewards to a person so shown to be undesirable or financially irresponsible or otherwise unqualified.

* * * * *

(c) The Stewards of The Jockey Club have power, at their discretion, to grant and to withdraw the approval of The Jockey Club to Associations in the conduct of meetings.

17. During the years 1945 through 1950 a statute of the State of New York provided that for the purpose of maintaining a proper control over race meetings, the plaintiff should license owners, trainers and jockeys at running races.

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As already indicated in finding 13, a statute of the State of New York in effect during the same time provided for the appointment of three stewards to supervise each race meeting, one of whom was to be appointed by the State Racing Commission, one by The Jockey Club, and one by the association conducting the race meeting.

18. During the years 1945 through 1950 plaintiff investigated the behavior of jockeys, reviewed and kept records of rulings against them for careless and fraudulent practices and general misconduct, and took disciplinary measures against some of them. During the same years, the plaintiff considered the applications of owners for licenses and in some cases refused such applications, because of the general character or financial responsibility of the applicant, because of his association with undesirable characters, or because he had been engaged in bookmaking; plaintiff also took disciplinary action against some trainers for various reasons such as the fact that horses trained by them had been found to have been stimulated or depressed.

19. During the years 1945 through 1950 running races were required to be conducted in accordance with the Rules of Racing promulgated by plaintiff. These rules require (with minor exception) that horses be registered with it in order to race; they require that before racing the horse bear a name approved and allowed by The Jockey Club; they require that partnerships, leases and other agreements for the racing of horses, as well as assumed names in which a person or persons may wish to race, be approved by and filed with The Jockey Club; they require jockeys' contracts to be approved by and filed with it; they require that racing colors be approved

by and filed with it. These rules are designed to permit orderly racing, to prevent participation in racing by persons of questionable character and to prevent deception or confusion.

20. Plaintiff's rules of racing are the basic rules of racing which have been adopted in the various States throughout the United States in which racing is conducted. The racing commission in each State has the right to make its own rules but they follow largely the plaintiff's rules of racing. The National Association of State Racing Commissioners, constituting the commissioners of all States in which racing is conducted, invites plaintiff to send a representative to consult with them in their deliberations, and they have expressed commendation of the services of plaintiff. Disciplinary measures taken by The Jockey Club against jockeys, trainers and owners are recognized by all jurisdictions both in the United States and abroad.

21. Plaintiff has originated and participated in the establishment of systems for identifying horses in order, for example, to prevent "ringing" (fraudulent substitution in a race of one horse for another).

22. Plaintiff has extensive records, including those sent to it from different States of the United States and from other countries, relating, among other things, to persons whose character qualifications to participate in the breeding and racing of thoroughbred horses are questionable. Its records are accurate and are often used by official racing bodies of New York and other States as a source of information. Plaintiff is frequently consulted, without charge, by the New York State Racing Commission and the racing authorities of other States.

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23. Since 1897 plaintiff has kept the American Stud Book, which records thoroughbred horses and their pedigrees. Breeders can there determine the blood lines of every thoroughbred registered in the United States and see the advantages gained from crossing of blood lines. The stable owner is primarily interested in acquiring horses that have successful blood lines and the only place they can search for that information is in the American Stud Book. Before recording therein strict proof of eligibility is required. The number of foals registered has increased annually so that now over 8,000 foals are registered each year. The number of foals registered by The Jockey Club in 1950 was 8,255, which was an all-time high. It also obtains for its records the stud books of other countries from which horses may be imported into the United States and for which horses application may be made for registration in the American Stud Book.

24. There is no other publication in the United States like the American Stud Book.

25. Without the American Stud Book it would be impossible to conduct in the United States the breeding and racing of thoroughbred horses.

26. The reason why only registered thoroughbreds are eligible for racing at authorized race meetings is that they have been specially bred for speed, stamina and courage. Other horses cannot successfully compete with them and there are so many horses in the United States that unless entries in authorized race meetings are limited to thoroughbreds it would be practically impossible to have race meetings.

27. The American Stud Book is recognized by the jockey clubs of England, France, Germany, and Italy.

28. Plaintiff is the liaison between American racing and racing in other countries.

29. Plaintiff publishes monthly and distributes its Racing Calendar in which is printed information which is available only therein and is important to the businesses of breeding and racing, such as information about races, and colors registered, names of horses, assumed names, partnerships, arrangements for leasing of horses, jockey contracts, and other contracts filed with plaintiff.

30. On its records, the only expenses plaintiff charged against the American Stud Book and the Racing Calendar were the costs of printing. Although considerable overhead was involved in compiling the material for these publications and in checking numerous entries to avoid mistakes, plaintiff did not undertake to allocate any of such overhead as an item of expense chargeable to the two publications. Had proper allocations of overhead been made during the taxable years involved here, it is reasonably probable that the accounts would have shown that plaintiff realized no profit on the sale of either the American Stud Book or the Racing Calendar.

31. Plaintiff instituted and conducts, without charge, a school for training and improving the quality of officials to officiate at thoroughbred race meetings throughout the United States, and such officials are in much demand.

32. Plaintiff maintains at its expense an experimental breeding bureau at Avon, New York, where mares of

farmers are served by thoroughbred stallions furnished in part by members of The Jockey Club for the purpose of improving the breed of horses. Foals dropped at this breeding bureau belonged to the owners of the mares rather than to The Jockey Club. Although stallion fees are charged, plaintiff's net expense for maintaining the breeding bureau during the taxable years in suit ran from a minimum of $7,937.70 in 1945 to a maximum of $16,158.19 in 1949.

33. The breeding and raising of thoroughbred horses are businesses in which millions of dollars are invested. Racing is one of the great spectator sports, being attended by more people in recent years than any other sport.

34. The owners of thoroughbred breeding farms and racing stables, including members of the plaintiff, direct and conduct their operations for the purpose of making a profit.

35. The activities of The Jockey Club are indispensable to the business of breeding and racing, including the business of its members engaged in breeding or racing or both.

36. The aggregate of the sales prices of yearlings sold at auctions by breeders throughout the United States totaled $5,069,303 in 1950. The number of yearlings sold at auction by breeders in the United States was 1,739 in 1950. There were more than 1,200 thoroughbred breeding farms in operation in the United States in 1950. About $400,000,000 is invested in such breeding farms.

37. There are approximately 25,000 thoroughbred horses, valued at nearly $90,000,000, on breeding farms.

Of these the 19,000 starting horses are valued at a minimum of $66,500,000. There are 83 thoroughbred race tracks in the United States valued at about $227,000,000. The number of persons employed in the thoroughbred racing industry in 1950 was approximately 62,000 and their total earnings were approximately $241,000,000.

38. The aggregate of the purses received each year by owners in the racing of thoroughbred horses throughout the United States increased from $5,375,554 in 1907 to $50,102,099 in 1950. The aggregate of the purses received in 1950 by such owners in New York State was $7,502,910.

39. In 1950 the attendance at thoroughbred race track meetings throughout the United States was 21,845,556. In New York State it was 4,238,542.

40. In 1950 pari-mutuel betting on thoroughbred racing throughout the United States was $1,358,739,248. In New York State in 1950 it was $308,477,512.

41. In 1950 the revenues of the States of the United States from pari-mutuel betting on thoroughbred racing totaled $83,772,287.62. The revenue of the State of New York from thoroughbred racing in 1950 was $20,597,745.60.

42. The activities of The Jockey Club have had a very important effect upon the integrity of racing and the increase of public confidence therein.

43. Increased public confidence in the integrity of racing increases attendance at the race tracks and increases pari-mutuel betting, which in turn leads to the offering of larger purses, which in turn increases the

value of thoroughbred race horses for racing and breeding purposes.

44. During the years 1945 through 1950 the members of plaintiff had a common interest in the breeding and racing of thoroughbred horses.

45. During the years 1945 through 1950 plaintiff's purpose was to promote the common interest in the breeding and racing of thoroughbred horses, and its activities were directed toward this purpose during those years.

46. As authorized by the Unconsolidated Laws of New York, members of plaintiff are admitted to race courses without charge. The same is true of owners of horses, stable managers, trainers, members of turf organizations, persons accredited by the press to attend such meetings, public officials engaged in the performance of their duties and other persons whose duties require their presence at the race tracks.

Paragraph 5 of the bylaws of plaintiff provides that the members are entitled to such club rooms and other privileges as may be prescribed from time to time by the Board of Stewards. Plaintiff does not perform particular services for its members, and its requirements, fees, and charges are the same for members as for nonmembers.

Rule 201 of the Rules of Racing provides in substance that any amateur who wishes to ride in races on even terms with jockeys shall first obtain leave from the stewards of The Jockey Club and pay $25 to the treasurer of The Jockey Club, but members of The Jockey Club and of the National Steeplechase and Hunt Association are exempt from this rule. Although members of plain-

tiff are granted a special privilege under the rule, there is no evidence that any of the members has ever ridden as an amateur in races on even terms with jockeys.

47. During the taxable years in issue, plaintiff received compensation, which is designated in its financial statements as "racing commissions." Such compensation was paid plaintiff for services rendered to five New York race tracks and one race track in Delaware and is composed of a per diem fee of $300 per racing day. Plaintiff's services were performed pursuant to letter contracts written by each of the race tracks to and accepted by plaintiff. Each of these contracts read in pertinent part as follows:

> Because of your long experience, your records and your means of preventing frauds and other acts detrimental to the best interests of racing, we desire to retain you to advise us in respect to the conduct of our 1951 race meeting, and particularly to assist us in safeguarding our race meeting and facilities against anything which would be harmful or detrimental to racing.

The services furnished by plaintiff included general supervision, investigation of persons engaged in racing, policing the grounds and some legal services. The policing was done by a police patrol furnished by plaintiff and paid for in part by it.

48. During the years 1945 through 1950 plaintiff's charges for services (other than "racing commissions" for its services to race tracks), including investigation and approval of applications, were as follows:

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For issuing "racing permit" for imported horse not qualified for registration	$50-200.
For registering a foal (and issuing registration certificate)—before Nov. 1 of the year in which foaled	$5.
For registering a foal (and issuing registration certificate)—thereafter and previous to the Jan. 1 next following its birth	$10.
For registering a foal (and issuing registration certificate)—thereafter and previous to March 1 of its "two-year-old-year" (that is the year beginning Jan. 1 and following the year in which foaled)	$50.
For naming a horse—before March 1 of "two-year-old-year"	No charge.
For naming a horse—after said March 1	$50.
For changing name of a horse—before January 1 of "two-year-old-year"	$10.
For changing name of a horse—after said January 1	$100.
For filing partnership agreements, leases and other arrangements for racing of horses	$1 per horse.
For registering assumed name of person wishing to race under assumed name	$100.
For registering change of assumed name	$100.
For licensing owners, trainers and jockeys	As fixed by State Racing Commission.
For filing a contract between a jockey and his employer	$1.
For registering racing colors—annually	$5.
For registering racing colors—for life	$25.
For copy of American Stud Book (the issue in evidence as Defendant's Exhibit 1 contains over 1700 pages)	$35.
For Supplements to Stud Book	$10.
For copy of "Racing Calendar"	35 cents per copy, $4 per year.

49. For the years in controversy, The Jockey Club received income and incurred expenditures as follows:

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INCOME

	1945	1947	1948	1949	1950
Income:					
Racing commissions	$58,021.91	$65,226.00	$67,862.30	$67,247.30	$65,068.40
Licenses and fees:					
Trainers' licenses	6,420.00	7,380.00	7,995.00	8,655.00	8,940.00
Jockeys' licenses	4,125.00	4,600.00	5,475.00	5,575.00	5,300.00
Owners' licenses	5,740.00	6,935.00	7,445.00	7,900.00	8,220.00
Employees' licenses	1,148.00	1,828.00	1,911.00	2,453.00	2,385.00
Less: Excess paid to New York State	3,847.43	7,905.93	9,847.34	11,436.07	11,439.42
Assumed names	9,800.00	13,700.00	14,100.00	14,500.00	15,900.00
Authorized agents	373.00	443.00	530.00	511.00	472.00
Changing names	3,140.00	1,340.00	2,705.00	1,970.00	1,750.00
Colors	3,475.00	3,190.00	3,370.00	3,445.00	3,425.00
Duplicate certificates	1,850.00	16,254.00	10,735.00	8,880.00	6,601.00
Export certificates	245.00	285.00	145.00	280.00	285.00
Jockey contracts	63.00	59.00	64.00	48.00	60.00
Leases	249.00	262.00	252.00	295.00	283.00
Life colors	4,075.00	4,525.00	3,850.00	3,700.00	4,200.00
Partnerships	427.00	513.00	584.00	593.00	664.00
Racing records	536.00	445.00	340.00	396.00	385.00
Tabulated pedigrees	1,320.00	1,260.00	1,220.00	745.00	983.00
Registration of foals:					
Foals current year	28,095.00	75,185.00	82,470.00	85,025.00	87,270.00
Foals prior years	950.00	1,200.00	1,650.00	2,603.00	2,095.00
Foreign registrations	55.00	925.00	1,135.00	805.00	1,495.00
Interest and dividends	10,504.28	11,850.94	12,898.43	13,384.36	13,931.12
Fines:					
Naming fines	2,900.00	4,100.00	10,050.00	9,660.00	5,550.00
Registration fines	6,720.00	15,930.00	13,505.00	12,820.00	12,650.00
Other:					
Forfeit commissions	.....	7.50	.....	.....	.....
Contingencies	33.00	12.00	25.00	33.00	34.00
Stud book registrations	40.00	100.00	190.00	30.00	10.00
Sundry income	717.90	2,123.70	2,034.90	1,926.50	2,075.70
Racing permits	.....	50.00	.....	500.00	330.00
Stud books	1,771.29	1,102.10	903.16	685.11	2,242.35
Stud book supplements	774.10	413.54	976.47	492.76	14.32
Racing in America Vol. I and II	58.52	(7.08)	(90.02)	5.88	2.94
Racing in America Vol. III	35.00	.....	.....	.....	7.54
Racing in America Vol. IV	180.65	28.30	39.85	39.15	10.35
Miscellaneous income	.....	885.00	1,264.34	339.32	12.00
Profit on sale of securities	.....	155.00	.....	5.44	15.52
Profit on sale of furniture and fixtures	.....	.....	.....	20.98	25.00
Interest on income tax refund	.....	.....	.....	194.29	.....
Total operating income	149,878.18	234,400.07	245,788.09	244,327.02	241,252.82
Annual dues of members	9,600.00	9,600.00	9,600.00	9,600.00	9,900.00
Initiation fees	.....	400.00	600.00	800.00	400.00
	159,478.18	244,400.07	255,988.09	254,727.02	251,552.82

Appendix A

EXPENSES

	1945	1947	1948	1949	1950
Operating expenses:					
Salaries:					
General office	$55,980.76	$69,497.78	$81,168.06	$84,195.91	$87,903.32
Handicapper, etc.	3,863.14	.....	.....	.....	.....
Rent	14,027.71	14,027.75	14,027.72	14,027.72	14,027.72
Pinkerton's National Detective Agency	3,643.44	7,966.84	7,898.16	9,221.14	7,531.93
Professional services:					
Legal	4,853.35	7,741.13	4,684.17	4,896.80	5,002.54
Auditing	500.00	800.00	800.00	800.00	800.00
Taxes:					
Delaware unemployment ins	.....	.....	8.37	8.91	9.72
New York unemployment ins	701.95	693.63	816.71	1,381.77	1,361.51
Federal unemployment ins	107.35	131.12	154.86	154.53	152.36
Federal old age benefit	357.87	437.02	516.28	515.05	761.81
New York city occupancy	7.00	7.00	7.00	7.00	7.00
Federal capital stock	187.50	.....	.....	.....	.....
The Jockey Club Gold Cup	2,880.00	2,880.00	2,880.00	3,675.00	3,726.50
Stationery and printing	2,521.86	7,590.94	4,192.93	5,121.33	5,117.44
Thoroughbred racing associations	.....	2,500.00	.....	.....	.....
Contributions:					
United hospital fund	200.00	200.00	200.00	200.00	200.00
The Jockey Club Foundation	2,000.00	4,000.00	4,000.00	.....	.....
Miscellaneous	30.00	20.00	10.00	.....	.....
Postage	1,299.44	2,092.80	1,824.01	1,637.37	2,184.69
Telephone and telegraph	1,368.23	1,678.30	1,783.41	2,311.49	2,124.80
Depreciation—furniture and fixtures	696.33	1,167.66	1,432.90	1,805.46	1,952.05
Library	189.10	309.78	413.30	496.53	611.17
Miscellaneous expenses	4,369.84	6,045.49	8,204.40	8,295.52	11,789.73
Federal income tax, 1943 and 1944 assessments	.....	.....	3,134.01	.....	.....
Interest on Federal income tax assessments, 1943 and 1944	.....	.....	1,072.85	.....	.....
Total operating expenses	99,784.87	129,787.24	139,229.14	138,751.53	145,264.29
Other deductions:					
Cost of operating—					
Breeding Bureau (net)	7,937.70	11,004.57	11,848.61	16,158.19	14,186.15
The racing calendar (net)	759.86	1,610.35	1,518.80	2,145.18	260.05
Loss on sale of securities (net)	10,747.62	.....	.....	.....	.....
Total expenses and deductions	119,230.05	142,402.16	152,596.55	157,054.90	159,710.49
Total income	159,478.18	244,400.07	255,988.09	254,727.02	251,552.82
Income before provisions for Federal income tax	40,248.13	101,997.91	103,391.54	97,672.12	91,842.33
Provision for Federal income tax	21,235.12	36,536.77	37,635.72	35,974.84	31,670.78
Net income for the year	19,013.01	65,461.14	65,755.79	61,697.28	60,171.55

Appendix A

50. As shown by plaintiff's exhibit 29, plaintiff's accumulated surplus at the end of 1950 was $730,243.78 for the period from 1894 through 1950. Plaintiff's total receipts from dues (including initiation fees) and from income from investments were $767,746.85. Of this amount, $426,700 came from dues (including initiation fees) and $341,046.85 was income from investments.

During 12 of the years between 1894 and 1950, plaintiff sustained losses.

Although there is no breakdown in plaintiff's records to show the total expenses chargeable per year to any one source of income, the evidence establishes that there was very little expense involved in the collection of dues, initiation fees, and income from investments. About 75 percent of plaintiff's investments were in Treasury bonds or certificates.

51. With the exception of some payments to charities, all of the earnings of plaintiff are used and held for its purposes and activities.

52. Plaintiff has pending against it claims of the State of New York for franchise taxes amounting with interest and penalties to approximately $75,000, and claims of the City of New York for general business taxes amounting with interest and penalties to approximately $9,000.

53. Plaintiff's activities have been and are increasing steadily. In 1953, plaintiff supplied 34 stewards and officials for race meets in various parts of the country, and in 1954 plaintiff had a request to supply a considerably larger number of officials for race meets. In view of the increasing volume of these requests, it appears that it will be necessary for plaintiff to train additional people to serve as racing officials and to incur the expense incident to such training.

Appendix A

54. Plaintiff has seriously considered several new projects and if these are undertaken by it, they will require the expenditure of substantial sums of money. One of these projects involves additional restrictions and requirements for the registration of foals. The operation of this project would require the employment of five crews, consisting of three men per crew working in five zones throughout the country. One member of the crew would be employed to keep statistics on markings on colts and dams and to take statements from attendants who are present at the time dams are served and foaled. Another member of the crew would either brand a foal on the hoof or tattoo its lip with a serial number. The third member of the crew, a photographer, would photograph the "night eyes" or "chestnuts" of the foals. Plaintiff has developed a system of photographing these chestnuts, which are bony browts on the legs of horses, and has found that photographs of the chestnuts are consistently as accurate a method of identification for horses as are fingerprints of human beings. It has been estimated that the cost of this project would exceed $75,000 per year.

Plaintiff also has under consideration a study of the effect of the administration of drugs, vitamins, and hormones to horses, both from the standpoint of whether vitamins and hormones are improper stimulants or depressants which affect a horse's racing condition, and also from the standpoint of whether the injection of hormones interferes with the breeding process. This is a matter with which breeders and other horsemen are deeply concerned. The cost of this proposed project has not been estimated, but it is apparent that it would be an expensive and extensive research program.

Appendix A

55. As stated in a preceding finding, an important source of plaintiff's revenue is the per diem paid to it by the various racing associations. Racing in New York was stopped during 1911, and that was one of the years during which plaintiff operated at a loss. If racing should be stopped in the future by a war or other causes, plaintiff's revenues would greatly decline. At the same time, it would be necessary for plaintiff to maintain the American Stud Book because, if dropped, it would be very difficult to continue the book again.

56. No distribution of plaintiff's profits, surplus or other assets has ever been made to members or is in contemplation.

57. There is no provision in plaintiff's Certificate of Incorporation or in its bylaws for distribution of any of its earnings to members.

58. It is the understanding of all members that no distribution of plaintiff's profits, surplus or other assets will ever be made either during the existence of the plaintiff or upon its dissolution. After the present tax controversy arose all members of plaintiff adopted unanimously an amendment to the bylaws stating in part as follows:

> All existing members by remaining members, and all future members by becoming members, agree that no member, his assignee or legal representatives, ever is to receive, during the existence or upon the dissolution of the Club, any distribution of its profits, surplus or other assets. This by-law is intended to state expressly the understanding which has always existed.

Appendix A

59. On or about March 15, 1946, plaintiff filed its United States income and excess profits tax returns for the year ending December 31, 1945 with the Collector of Internal Revenue for the Third District of New York, at 110 East 45th Street, New York, New York; and in 1946 paid to said collector the total sum of $21,217.95, as follows: $5,330.74 on March 15; $5,330.74 on June 13; $5,251.98 on September 13; $5,304.49 on December 13.

60. On or about November 8, 1948, the Commissioner of Internal Revenue and plaintiff entered into an agreement extending to June 30, 1950, the time for assessment of any United States income, excess profits and war profits taxes of the plaintiff for the year ending December 31, 1945.

61. On or about June 15, 1950, plaintiff filed with said Collector of Internal Revenue for the Third District of New York a claim for refund of said taxes in the sum of $21,217.95 on the ground that it is exempt from such income and excess profits taxes under Section 101, subsections (7) and (8) of the Internal Revenue Code.

62. Six months had elapsed from the date of filing said claim to the date of the filing of the petition herein and the said Commissioner had not rendered a decision upon said claim at the time of the filing of said petition.

63. On or about January 26, 1952, plaintiff filed an exemption affidavit with the Collector of Internal Revenue for the Third District of New York claiming exemption from income and excess profits taxes, past, present and future under Section 101, subsection (7), of the Internal Revenue Code.

64. On or about March 12, 1953, the Commissioner of Internal Revenue mailed to The Jockey Club a letter ruling that it was and is not exempt from tax under paragraphs (7) and (8) of Section 101 of the Internal Revenue Code or either of them.

65. On or about March 15, 1948, plaintiff filed with the Collector of Internal Revenue for the Third District of New York its United States income tax return for the year ending December 31, 1947; and in 1948 paid to said Collector the total sum of $36,369.25, in four equal installments on or about March 15, June 3, September 15, and December 15.

66. On or about June 15, 1950, plaintiff filed with said Collector of Internal Revenue a claim for refund of said income tax for the year 1947 on the ground that it is exempt from income taxes under Section 101, subsections (7) and (8) of the Internal Revenue Code. On or about March 13, 1952, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

67. On or about March 15, 1949, plaintiff filed with the Collector of Internal Revenue for the Third District of New York its United States income tax return for the year ended December 31, 1948; and in 1949 paid to said collector the total sum of $38,317.84, in four equal installments on or about March 15, June 15, September 15, and December 15.

68. On or about June 15, 1950, plaintiff filed with the Collector of Internal Revenue for the Third District of New York a claim for refund of said income tax for the year 1948 on the ground that it is exempt from income

taxes under Section 101, subsections (7) and (8) of the Internal Revenue Code.

69. On or about March 13, 1952, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

70. On or about March 11, 1950, plaintiff filed with the Collector of Internal Revenue for the Third District of New York its United States income tax return for the year ending December 31, 1949; and in 1950 paid to said collector the total sum of $35,457.47, in four equal installments on or about March 11, June 9, September 7 and December 1.

71. On or about March 29, 1952, plaintiff filed with said Collector of Internal Revenue a claim for refund of said income tax for the year 1949 on the ground that it is exempt from income taxes under Section 101, subsections (7) and (8) of the Internal Revenue Code.

72. Six months had elapsed from the date of filing of said claim to the date of the filing of the petition herein and the Commissioner had not rendered a decision at the time of the filing of said petition.

73. On or about March 14, 1951, plaintiff filed with the Collector of Internal Revenue for the Third District of New York its United States income and excess profits tax returns for the year ending December 31, 1950; and in 1951 paid to said collector the total sum of $32,318.28, as follows: $8,079.57 on March 15; $8,079.57 on June 15; $3,231.83 on June 25; $6,463.66 on September 14; $6,463.65 on December 14.

74. On or about February 29, 1952, plaintiff filed with the Collector of Internal Revenue of the Third District of New York a claim for refund of said income and excess profits taxes for the year 1950 on the ground that it is exempt from income and excess profits taxes under Section 101, subsections (7) and (8) of the Internal Revenue Code.

75. Six months had elapsed from the date of the filing of said claim to the date of the filing of the petition herein and the Commissioner had not rendered a decision at the time of the filing of said petition.

APPENDIX B

Judgment

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law plaintiff is not entitled to recover and the petition is therefore dismissed.

APPENDIX C

Order Overruling Motion for Rehearing

United States Court of Claims

THE JOCKEY CLUB *v.* THE UNITED STATES	No. 197-53

Clerk's Office

Washington, D. C., April 3, 1956

To Attorney of Record and Assistant Attorney General and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order:

Overruled.

Respectfully,

WILLARD L. HART
Clerk, Court of Claims.

APPENDIX D

Statutes and Regulations

Internal Revenue Code of 1939 (U. S. Code, Title 26):

§101. Exemptions from tax on corporations.

The following organizations shall be exempt from taxation under this chapter—* * *

(7) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * *

Income Tax Regulations 111 (26 CFR, 1949 Edition, §29.101(7)-1):

Sec. 29.101(7)-1. **Business leagues, chambers of commerce, real estate boards, and boards of trade.** —A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its

income is devoted to the purpose stated. A stock exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of the Internal Revenue Code and is not exempt from tax.

Revenue Act of 1950 (64 Stat. 906, 948-953):

TITLE III—TREATMENT OF INCOME OF, AND GIFTS AND BEQUESTS TO, CERTAIN TAX-EXEMPT ORGANIZATIONS

PART I—TAXATION OF BUSINESS INCOME OF CERTAIN TAX-EXEMPT ORGANIZATIONS

§301. **Income of educational, charitable, and certain other exempt organizations.**

(a) **Tax on certain types of income.**—Supplement U of chapter 1 is hereby amended to read as follows:

"SUPPLEMENT U—TAXATION OF BUSINESS INCOME OF CERTAIN SECTION 101 ORGANIZATIONS.

"§421. **Imposition of tax.**

"(a) **In general.**—There shall be levied, collected, and paid for each taxable year beginning after December 31, 1950—

"(1) upon the supplement U net income (as defined in subsection (c)) of every organization described in subsection (b) (1), a normal tax of 25 per centum of the supplement U net income, and a surtax of 20 per centum of the amount of the supplement U net income in excess of $25,000.

* * * * *

"(b) **Organizations subject to tax.—**

"(1) **Organizations taxable as corporations.**—The taxes imposed by subsection (a) (1) shall apply in the case of any organization (other than a church, a convention or association of churches, or a trust described in paragraph (2)) which is exempt, ex-

cept as provided in this supplement, from taxation under this chapter by reason of paragraph (1), (6), or (7) of section 101. * * *

"(c) **Definition of supplement U net income.**—The term 'supplement U net income' of an organization means the amount by which its unrelated business net income (as defined in section 422) exceeds $1,000.

* * * * *

"§422. **Unrelated business net income.**

"(a) **Definition.**—The term 'unrelated business net income' means the gross income derived by any organization from any unrelated trade or business (as defined in subsection (b)) regularly carried on by it, less the deductions allowed by section 23 which are directly connected with the carrying on of such trade or business, subject to the following exceptions, additions, and limitations:

* * * * *

"(b) **Unrelated trade or business.**—The term 'unrelated trade or business' means, in the case of any organization subject to the tax imposed by section 421(a), any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 101, * * *—"

Appendix D

§302. EXEMPTION OF CERTAIN ORGANIZATIONS FOR PAST YEARS.

(a) **Trade or business not unrelated.**—For any taxable year beginning prior to January 1, 1951, no organization shall be denied exemption under paragraph (1), (6), or (7) of section 101 of the Internal Revenue Code on the grounds that it is carrying on a trade or business for profit if the income from such trade or business would not be taxable as unrelated business income under the provisions of Supplement U of the Internal Revenue Code, as amended by this Act, or if such trade or business is the rental by such organization of its real property (including personal property leased with the real property).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 202

THE JOCKEY CLUB, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 19-25) is reported at 137 F. Supp. 419.

JURISDICTION

The judgment of the Court of Claims dismissing the petition (Pet. 50) was filed on January 31, 1956, and a motion for rehearing was denied on April 3, 1956 (Pet. 51). The petition for a writ of certiorari was filed on June 26, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether petitioner is entitled to exemption from tax as a business league under Section 101(7) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.
>
> The following organizations shall be exempt from taxation under this chapter—
>
> * * * * *
>
> (7) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.
>
> (26 U.S.C. 1952 ed., Sec. 101.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> Sec. 29.101(7)-1. *Business leagues, chambers of commerce, real estate boards, and boards of trade.* —A business league is an association of persons having some common business interests, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is organization of the same general class as a chamber of commerce or board of trade. Thus its activities should be directed to the improvement of business con-

ditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. * * *

STATEMENT

The petitioner filed suit in the Court of Claims seeking a refund of income taxes paid during the years 1945 through 1950, except 1947 when it had no net income, on the ground that it was exempt from tax under Section 101(7) of the Internal Revenue Code of 1939. (Pet. 19-20.) The Court of Claims denied the claimed exemption status (Pet. 23-25) and dismissed the petition (Pet. 50).

The detailed findings of fact of the Court of Claims (Pet. 25-50) may be summarized as follows:

Petitioner, the Jockey Club, was organized under New York legislation in 1894 after a group of owners and breeders of thoroughbred race horses in the United States adopted a resolution proposing the formation of such a club of 50 members to encourage the development of the thoroughbred horse and to establish racing on a basis commanding public confidence and interest. They contemplated that the organization would establish a firm authority over all racing which might come within its control, punish offenders against accepted racing rules, protect the interest of the public in racing, and dispense justice in respect of all questions pertaining to racing which might affect the welfare of the associations racing under the rules of the proposed

organization. The Club's particular objects and purposes, as set forth in its certificate of incorporation, are "the investigating, ascertaining and keeping a record of the pedigree of horses, and of instituting, maintaining, controlling and publishing a *Stud Book* or Book of Registry of horses in the United States of America and Canada; and of promoting and holding exhibitions of such horses *and generally for the purpose of improving the breed thereof.*" (Pet. 25-26.)

The Club has no capital stock, corporate shares or certificates of ownership of any kind. Its by-laws provide for a membership of 50 persons who shall be interested in the breeding and racing of horses. Membership is by election and is not transferable. The initiation fee per member is $200 and the annual subscription $200 a year per member. During the years 1945 through 1950 about 35 or 36 of the 50 members owned thoroughbred breeding farms, and all, with the possible exception of one, owned or raced thoroughbred horses. (Pet. 27.)

The Club's affairs are managed by a board of nine stewards which corresponds to the board of directors of a business. The stewards receive no compensation. The Club has the usual corporate officers, of whom only the executive secretary receives a salary. He is not a steward or member of the Club. There are 22 employees. (Pet. 27-30.)

The Club has promulgated rules of racing which are accepted as the basic rules and have been adopted wherever racing is conducted in the United States. They deal with every feature of the arrangements necessary for the conduct of racing. Among other things, the Club passes upon the applications of owners, trainers and jockeys for licenses, investigates their charac-

ter and responsibility, and in proper cases takes disciplinary measures against them which are recognized in all jurisdictions where racing takes place, both in the United States and abroad. (Pet. 31-34.)

Since 1897 the Club has kept and published the American Stud Book, the only source from which breeders can learn the blood lines of every thoroughbred horse registered in the United States. The book is indispensable to the breeding and racing of thoroughbred horses in the United States. The Club also publishes monthly and distributes its Racing Calendar, which contains information only available therein and is important to the businesses of breeding and racing. On its records the Club did not allocate its overhead expenses attributable to the two publications, but it is reasonably probable that the Club realized no profit on the sale of either the American Stud Book or the Racing Calendar. (Pet. 35-36.)

The Club instituted and conducts, without charge, a school for training and improving the quality of officials to officiate at thoroughbred race meetings throughout the United States. Such officials are in much demand. (Pet. 36.)

The Club maintains at its expense an experimental breeding station at Avon, New York. Stallions, some of which belong to members of the Club, are kept at the breeding farm. Stallion fees are charged but the farm does not make a profit. (Pet. 30, 36-37.)

During the taxable years the Club's purpose was to promote the common interest in breeding and racing thoroughbred horses and the Club's activities were directed toward that purpose. The members of the Club also had a common interest in the breeding and racing of thoroughbred horses. (Pet. 39.)

The breeding and racing of thoroughbred horses are businesses in which millions of dollars are invested and are conducted for the purpose of making a profit. The activities of the Club are indispensable to these businesses, including the businesses of its members engaged in breeding or racing or both. The activities of the Club have had an important effect in increasing the value of thoroughbred race horses for racing and breeding purposes. (Pet. 37-39.)

The Club had a net income of more than $60,000 in four of the five taxable years involved. Except for some payments to charities, the Club's income is used or held for its corporate purposes. Its surplus, which had been accumulated since 1894, was $730,243.78 at the end of 1950. The total receipts from dues and from income from investments was $767,746.85, of which $426,700 came from dues and $341,046.85 was income from investments. The Club has in contemplation new activities which would require large expenditures. (Pet. 41-45.)

During the taxable years the Club derived income and incurred expenses which are shown in detail at Pet. 42-43. The major portion of the income was derived from the rendition of services, of which compensation designated as "racing commissions" was the largest single item. Such compensation, which totalled between over $58,000 and over $67,000 in the taxable years, was paid to the Club for services rendered to five New York race tracks and one race track in Delaware and was composed of a per diem fee of $300 a racing day for, among other things, the general supervision of race meetings, the investigation of persons engaged in racing, policing the grounds and some legal services. Such services were performed pursuant

to letter contracts. Income was also derived by the Club from charges made for numerous other services, including the licensing of jockeys, trainers, owners and employees. (Pet. 40-42.)

The Court of Claims held that the Club's business and service activities precluded it from exempt status under Code Section 101(7) and the Treasury Regulation thereunder. (Pet. 23-25.)

ARGUMENT

As grounds for certiorari, the petitioner asserts that the decision below is not supported by proper findings of fact (Pet. 14-16), that it conflicts with other decisions, including decisions of this Court (Pet. 8-14), and involves an important question which should be settled by this Court (Pet. 16-17). These assertions are erroneous.

1. Section 29.101(7)-1 of Treasury Regulation 111, *supra*, pp. 2-3, stating a long-standing interpretation,[1] declares that exemption as a business league is unavailable where the claimant organization (1) has the purpose of engaging "in a regular business of a kind ordinarily carried on for profit" or (2) directs its activities to "the performance of particular services for individual persons." Petitioner does not question the validity of these plainly proper tests under 1939 Code Section 101(7), but asserts that the Court of Claims made no valid findings to support its agreement with the Commissioner that the exemption should be denied. Contrary to this assertion, the findings fully and

[1] See to the same effect as this Regulation under the 1939 Code Article 101(7)-1 of Treasury Regulation 86, promulgated under the Revenue Act of 1934. The regulations before that were substantially the same. See, *e.g.*, Article 518 of Treasury Regulations 45 (1920 ed.).

explicitly support denial of the exemption on each of the two alternative grounds.

The findings show that petitioner's principal activities were those of a service organization for individuals (see Pet. 27-44), including the publication of the Stud Book and the Racing Calendar. These latter enterprises, as the court stated (Pet. 24), would certainly have been undertaken by someone as a business activity for profit were it not for the fact that petitioner already covered the field. Petitioner is clearly mistaken, we think, in its suggestion (Pet. 14) that its exclusive position in carrying on these particular profitable ventures precludes a finding that they constituted "a regular business of a kind ordinarily carried on for profit." The Court of Claims correctly held (Pet. 24) that, as a matter of commonly known fact, petitioner's services were substantially like other trade publication and trade service enterprises "ordinarily carried on for profit."

2. While the decisions on which petitioner relies for conflicts hold that an "incidental" service or business activity does not preclude exemption, the asserted conflicts are based on the premise that "incidental" means "related" (see Pet. 11-14), whereas the word "incidental" has been used in the decisions in contrast to "principal." Thus, in *Trinidad* v. *Sagrada Orden*, 263 U. S. 578, which involved subsection (6) rather than subsection (7) of the exemption statute, it was held that a concededly religious corporation was not to be denied exemption because of "limited trading, if it can be called such" (p. 581) which was not done for profit, did "not amount to engaging in trade in any proper sense of the term" (p. 582), and involved articles "for strictly religious use" and for "uses which are purely inciden-

tal to the work which the plaintiff is carrying on" (p. 582). The Court of Appeals' decisions cited by taxpayer (*Commissioner* v. *Chicago Graphic Arts F.*, 128 F. 2d 424 (C.A. 7th); *Crooks* v. *Kansas City Hay Dealers' Ass'n*, 37 F. 2d 83 (C.A. 8th); *Retailers Credit Ass'n* v. *Commissioner*, 90 F. 2d 47 (C.A. 9th)) apply the *Sagrada Orden* decision to the statute and regulation relating to business leagues. In the *Chicago Graphic Arts* and *Kansas City Hay Dealers' Ass'n* cases the service activities held to be "incidental" were related, minor activities which resulted in only small profits. In *Retailers Credit Ass'n* a distinction was specifically drawn between "incidental" and "principal," and exemption was denied on the ground that the service activity was in fact "a principal or main purpose" (p. 52). The distinction is one which has also been drawn in other cases. See *Automotive Electric Ass'n* v. *Commissioner*, 168 F. 2d 366 (C.A. 6th); *General Contractors' Ass'n* v. *United States*, 202 F. 2d 633 (C.A. 7th). See, also, *Underwriters' Laboratories* v. *Commissioner*, 135 F. 2d 371 (C. A. 7th), where exemption was denied because the business or service activity was conducted for profit.

In the present case, where petitioner performed many services for individuals, for profit both to petitioner and to the individuals, decision rests on the conclusion of the court below (Pet. 24), amply supported by the facts, that the performance of such services was one of petitioner's "principal" activities and sources of income. The performance of the services was obviously also one of petitioner's principal purposes. There is no conflict between the decision below and the cited cases.

3. Petitioner contends (Pet. 16-17) that this case is important as a vehicle for determining whether the test

for exemption under Section 101(7) should be "the destination of the income," a criterion applied in some decisions under *subsection (6)* of 101, or "the source of the income * * *." But this difference, which we have urged to present no basis for certiorari now even in cases which fairly present it under 101(6), is still more clearly unworthy of review in this case under 101(7).

There is an acknowledged conflict as to whether an organization engaged in a business for profit is entitled to the charitable or educational exemption under Section 101(6) simply by reason of the ultimate destination of its income (cf. *John Danz Charitable Tr.* v. *Commissioner*, 231 F. 2d 673 (C.A. 9th), pending on petition for certiorari, No. 145, this Term, and *United States* v. *Community Services*, 189 F. 2d 421 (C.A. 4th), certiorari denied, 342 U. S. 932, with *Sico Co.* v. *United States*, 102 F. Supp. 197 (C. Cls.), and *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (C.A. 3d)). However, as we show in our brief in opposition to certiorari in *John Danz Charitable Tr.* v. *Commissioner*, *supra*, that question is now largely academic. And the present case does not even involve any such question. Here subsection (7), rather than subsection (6), is involved and the question is with respect to exemption as a "business league," a term which, under Section 29.101(7)-1 of Treasury Regulations 111, covers only an organization directed to the improvement of business conditions which does *not* perform particular services for individuals. In other words, it is the type of business activity which determines whether the organization is exempt. As applied by the courts, the regulation precludes exemption when the organization performs services for individuals except when such activities are purely in-

cidental, not just related, to a purpose to improve business conditions. Thus, the question which petitioner asserts to be important and asks this Court to settle is one which is already settled by a regulation having the force and effect of law.[2]

Sections 301 and 302 of the Revenue Act of 1950, c. 994, 64 Stat. 906, relied upon by taxpayer (Pet. 11-13), have no particular bearing on this case. Sections 421 and 422 of the 1939 Code, as amended by Section 301 of the 1950 Act, imposed a tax on the unrelated net income of *exempt* corporations for taxable years beginning after December 31, 1950. Section 302(a) of the 1950 Act provided that for taxable years beginning prior to January 1, 1951, no organization should be denied exemption under Section 101(7) (and certain other paragraphs of Section 101) on the ground that it was carrying on a business for profit if the income of such trade or business would not be taxable as unrelated business income under the 1950 amendments to Sections 421 and 422 of the Code. S. Rep. No. 2375, 81st Cong., 2d Sess., p. 118 (1950-2 Cum. Bull. 483, 567), stated that this provision applied only where a denial of exemption might be made on the ground that the organization was carrying on a business for profit and "nothing therein limits the denial of exemption for failure to meet other requirements of section 101." As the Court of Claims held, the taxpayer here does not meet the requirement of Section 101(7), as implemented by Section 29.101(7)-1 of Treasury Regula-

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[2] Since the test of exemption under Section 101(7) clearly excludes destination of income as a basis for exemption, petitioner is incorrect in asserting (Pet. 10) that the decision below is in conflict with the decision of the same court in *Sico Co.* v. *United States*, *supra*, which involved Section 101(6), not Section 101(7).

tions 111, that its activities be directed to the improvement of business conditions in one or more lines of business "as distinguished from the performance of particular services for individual persons." Thus, the problems which might arise under Sections 301 and 302 are never reached in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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